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ABSTRACT

Reviews of publications about privacy law, of recent court actions, and of interviews with newspaper photographers and attorneys indicate that torts of privacy often conflict with the freedoms to publish and to gather news. Although some guidelines have already been established (about running distorted pictures, "stealing" pictures, taking pictures in courtrooms), some areas of uncertainty exist in the expansion of privacy laws to include torts of false light (misrepresenting the facts either by darkroom or lens distortion or by misinformation in captions), invasion of privacy (publishing embarrassing private facts), and appropriation (making money at the expense of someone's privacy). In general, photographers have not adjusted their picture taking procedures, tending to let editors and attorneys sort out the difficulties attendant to printing news photographs. But procedures could be developed to minimize exposure to lawsuits. Besides the general rules already established, these procedures might include getting identifications from all principals in shots (making them aware of the picture taking), requiring photographers to check captions on their photographs prior to publication, and providing a standard release form for all minors who are photographed. (RL)

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Privacy Law and Print Photojournalism

by

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TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC) AND USERS OF THE ERIC SYSTEM."

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INTRODUCTION

This paper grew out of an attempt to develop guidelines for practitioners of photojournalism in light of the expansion of, and present uncertainties in privacy law.

Four procedures were necessary for this task. The first was a review of the present literature and current cases affecting this field. Most articles review the history and make generalizations about the state of privacy and the photograph.

The second need was to establish agreed upon facts and identify potential problems.

The third was to survey practioners in the field, both attorneys and photographers, about their understandings of the situation and actual practices.

The fourth would be the development of guidelines for practitioners.

This paper is a beginning in that process of developing guidelines but stops short of making an actual definitive list. Many of the attorneys interviewed were wary of an actual list because it could be used against publications in lawsuits. In deference to that concern, this paper will mention prohibitions already defined by case and statute and indicate "worry areas" in the undefined territory.

ESTABLISHED CONCEPTS

The diminishment of possibilities for recovery under libel law and the attendant expansion of privacy law has media attorneys worrying more but photographers are not shooting less.

A reading of recent cases in privacy law and an unstructured survey of media attorneys and photographers show that the chilling effect of the unknown in privacy law has reached the law offices but not the darkroom. Photographers are shooting "anything that moves" and letting the editors and lawyers decide how cold the front page should be.. Photographers are, however, more sensitive about telling how a picture was shot than they used to be.

Three recent publications on privacy law and the photograph agree on certain facts and this paper will just state these points briefly. The recent publications are Paul Clancy "Privacy and the First Amendment,"[1] Marilyn Lashner "Privacy and the Public's Right to Know,"[2] and "Photography v. Privacy" by Nick Lacy.[3]

Paul Clancy outlines the potential conflicts in "the uneasy truce between freedom of expression and privacy." He points out that "when laws are enacted in the name of shielding the public, the rights of Americans to have a free press will be diminished."[4] Although the thrust of his article is

on the conflict of FOI and privacy laws, he makes two points germane to this paper. The first is that "the right of privacy is the right of the individual to control what others know about them."[5] The second is that "in short, the suspicion is growing. . .and it may be well founded. . .that some courts, some legislators, some bureaucrats who would not have thought of it before are using the strong tide of privacy as a way to get at the press."[6]

Both Lashner and Lacy do an excellent job of tracing the history of privacy law in their articles. At present, privacy is a tort but is often mentioned as a possible constitutional right.

Lacy quotes the Restatement of the Law Second, Section 652A, which sets forth the general principles of privacy:

1) One who invades the right of privacy of another is subject to liability to the other if the invasion is unreasonable.

2) The right of privacy is invaded when there is

   a) intrusion upon the seclusion of another as stated in sec. 652B; or

   b) appropriation of the other's name or likeness, as stated in sec. 652C; or

   c) publicity given to the other's private life, as stated in sec. 652D; or

   d) publicity which places the other in a false light before the public, as stated in 652E.

In 652D liability is present if the photograph is offensive to a 'reasonable person' or if the matter is not of legitimate public concern. In 652E the same thing occurs regarding offensiveness but, instead of legitimate concern, the 'actor' must have 'knowledge of the falsity or acted in reckless disregard of it.' Both of these restrictions are capable of broad interpretation.[7]

Defenses are truth, newsworthiness and consent. Truth is a defense only in false light cases and newsworthiness is not a defense in intrusion.

Since Time v. Hill, 385 U.S. 374, 87 S. Ct. 534, 17 L.Ed. 2d 456 (1967), the standard of actual malice or "reckless disregard of the truth" has applied to the torts of false light and publication of embarrassing private facts.

Both Lacy and Lashner discuss the balancing concept of the Supreme Court when considering the interfacing of the public's right to know and the right to have others not know.

Only four Supreme Court cases have explored the tension between privacy and the first amendment as it affects the photographer. They are: Time, Inc. v. Hill, supra, Cantrell v. Forest City Publishing Co., 95 S. Ct. 465 (1974), Cox Broadcasting Corporation v. Cohn, 5 S. Ct. 102 (1975) and Zachini v. Scripps Howard, 45 L.W. 4954 (1977).

The battle between privacy and the First Amendment is being fought out in state courts, particularly those in New York, Florida and California. Precedents established in these courts are being quoted in other courts to build a body of mass media privacy law. Strong trends are hard to identify, however.

Three reasons could explain the paucity of precedent decisions. The first reason is the readiness of media attorneys to settle cases where damaging precedents might occur.

The second would be the strong support the courts have

given the news media under the New York Times doctrine which established that actual malice was necessary to obtain damages.[8]

The third reason is the confusion about the law and the difficulty of proving damages in privacy law under the Time, Inc. v. Hill doctrine.

However, the precedent-setting cases will probably not come from the established press but from some freaky case in a fringe area of mass media such as Gallella v. Onassis, 487 F.2d 986 (1973), where the courts put a physical distance on the right to gather news. It was based on the fact that harassment is a crime in New York and newsmen have no right to commit a crime while gathering news.

Clear Guidelines

The present hodge-podge of laws, cases and statutes does establish certain things photographers should not do if they wish to avoid damaging litigation.

1) They should not run a picture that is distorted, either in the darkroom or by angle or lens, which shows a person in a situation that is not true. This situation can be controlled by photographers' ethics.

2) They should not "steal" or surreptitiously take photographs, or photograph over protests, in private places. This includes homes, offices and hospitals (Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971); Barber v. Time, Inc., 348 Mo. 1199, 159 S.W.2d 291 (1942). ("Stealing" a photograph is defined in the trade as taking a photograph when someone is unaware that they are in front of a camera.)

3) Photographs, even if taken in a public place, should not ridicule or embarrass a private person unless it is a patently newsworthy photo. A picture of a woman in a funhouse with her skirt blown up was collectible (Daily Times Democrat v. Graham, 276 Ala. 380 162 S.2d 474 (1964).

4) Photographs or their captions should not hold someone up to false light. This is the area that has had the most litigation. Usually a caption is misplaced or is badly written. In Cantrell v. Forest City, supra, the reporter knew that he had not interviewed a widow of a disaster victim yet described her face and her situation. The photographer however, was not actionable because his pictures did not represent the family in a false light.

5) Photographers cannot, under Canon 35, take pictures in federal and some state courts.

AREAS OF UNCERTAINTY

Both Lacy and Lashner limit their writing to the torts of disclosure and false light publicity.

Lashner bases her limitation on the belief that invasion and appropriation do not affect the right to disseminate information and, therefore, do not conflict with the "right to know." She regards invasion and appropriation as basically "property right" questions. Recent cases argue with this interpretation however.

Lacy makes the statement that "in general photographers have met with restrictions only when a person was presented in a false light."[9]

This is true if you define "restrictions" to winning cases, eventually, in higher courts, after the fact of publication.

There are three areas, however, where the torts of invasion and appropriation affect the right to know of the American public, and affect the ability of newspapers to perform their functions.

1) Both these torts have a high harassment value. Many cases are brought in the appropriation and trespass areas that have to be fended off by attorneys at great cost.

2) Editors are hampered by "good taste" restrictions. By the time they have considered all the privacy questions in a deadline situation, they err on the safe side. It leads to dull newspapers by attrition.

3) Intrusion is a tort that directly affects the right of photographers (and reporters) to gather news. Linked with the Branzburg v. Hayes, 408 U.S. 655 (1972) philosophy that reporters have no more right to access than the general public, it can be a growing constriction on newsgathering.

The Tort of Intrusion

Trespass-intrusion is a major problem. The photo proves that the photographer is present and even if it is a fair representation of the facts, truth may not be a protection. In addition, the intrusion tort violates the Blackstonian concept of no prior restraint because one does

not even have to publish to be harassed.

Several cases in the last few years show that plaintiffs are probing this probable weakness in the press armor. The problem is twofold. First, invocation of the trepass tort strikes at the reporter's access to the news. Second, it tends to be the last resort of an outraged citizen or hostile subject of a news photo or story. It is often a throwaway addenda to a defamation suit. But, increasingly, it is the complaint that compells a settlement.

Truth is no defense, newsworthiness is not a defense until it is published and actual malice need not be proved. Intrusion of privacy is a strange tort.

Nelson and Teeter state that:

> Today the Tort subdivision of intrusion includes affront ranging from illegal entry into a person's dwelling to peeping into windows. Where intrusion cases are concerned, occasionally the camera has been a big troublemaker. Courts have held that it is not an invasion of privacy to take someones' photograph in a public place. Here, the media's cameramen are protected on grounds that they 'stand in' for the public, taking pictures of what any person could see if they were there.
>
> It follows, of course, that photographers should beware of taking photos in private places. When a journalist or photographer invades private territory, he and his employer could be in trouble.[10]

Recent trends in privacy law make lawyers more wary in the public areas but the private areas are clearly a problem.

In Florida Publishing Co. v. Fletcher 2 Med. L. Repr. 1089 (1976) at 1096, the Florida Supreme Court reversed a lower court decision against the newspaper for trespassing.

The reversal was on the basis that "as a matter of law an entry, that may otherwise be an actionable trespass, becomes lawful and nonactionable when it is done under common usage, custom and practice."

However, what happens when the police or fire people do not want press photographers at fires, accidents and raids? What happens to the common usage defense then? This is not a spurious issue. The presence of a press photographer at the scene of many events is essential to the watchdog role of the press. A photographer must be on the scene to get a picture. This is important to the credibility of the reporting but makes the photographer actionable under trespass law if he is not invited by the fire, police or proprietor.

Close on the heels of the Fletcher decision came the Green Valley School Inc. v. Cowles Florida Broadcasting, Inc. in the seventh Circuit Court Florida Court which was decided in favor of the defendant on August 12, 1977. The point of issue was the trespass of a broadcast team of WESH-TV while accompanying the police of Volusia County on a raid of a controversial school for detained minors. It was settled on the basis of the Fletcher case.[11]

The problem here was the right of access of a reporter to the news. What if the police had not invited that team along and they had gone on their own?

In the wake of the Fletcher and Green Valley cases, Florida State Police faced up to this problem.

The Florida Highway Patrol, after a strong protest from the Palm Beach Post Times to the harassment of two staff photographers, passed a statement of policy regarding "Journalists' Right of Access to Crime, Arrest or Disaster Scenes:"

> Troopers shall cooperate with representatives of the news media to the extent necessary to enable the public to receive a complete report of pending accident, disaster or criminal investigations. Toward that end:
>
> 1. Representatives of the news media may be asked to show their press credentials if members in fact entertain doubts as to their affiliation with the news media.
>
> 2. Representatives of the news media may not resist, obstruct or oppose a member in the lawful execution of a legal duty. However, the presence of a reporter or photographer at an accident, crime or disaster scene and the taking of photographs at the scene or the asking of questions relative to the incident, do not constitute unlawful interference, and should not be restricted.
>
> 3. Troopers need not concern themselves with the law of trespass in dealing with members of the press at the scene of a crime, accident or disaster. It is the long standing custom of law enforcement agencies to invite representatives of the news media to enter upon private property where an event of public interest has occurred. News media representatives are required to enter in a peaceful manner, and not to cause any physical damage.
>
> 4. Representatives of the news media have an absolute right to photograph and report any event which transpires on public property, subject only to the limitations set forth in paragraph 3.[12]

However, paranoid press persons will point out that this is a policy adopted by the police and can be revoked at any time. Press cards are also given as signs of favor by the police and can be recalled.

This gives reporters access by policy of the state

police in Florida but other states may react differently.

There is a growing train of thought that the press can be limited to access to the news more easily than punished after getting and publishing it.

It has been established that the press has no right of access to the news beyond that of the general public. In Bransburg v. Hayes, supra, Justice Byron R. White delivered the opinion of the court and said as part of the background:

> It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed. The Court has emphasized that 'the publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.' Associated Press v. NLRB.
>
> It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. In Zemel v. Rusk, for example the Court sustained the Government's refusal to validate passports to Cuba even though that restriction 'rendered less than wholly free the flow of information concerning that country.' The ban on travel was held constitutional, for 'the right to speak and publish does not carry with it the unrestrained right to gather information.'
>
> Despite the fact that newsgathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal. . .[13] [emphasis ~~mine~~ author's]

Justice Potter Stewart has said that:

> The press is free to do battle against secrecy and deception in government but the press cannot expect in the constitution any guarantee that it will succeed. The constitution establishes the contest, not the resolution.[14]

Other cases which delineate limited access for the press are Pell v. Procunier; 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed 2d 495 (1974); Saxbe v. Washington Post Co., 417 U.S. 843, 94 S.Ct. 2811; 41 L.Ed. 2d 514 (1974); Zemel v. Rusk, 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed. 2d 179 (1965); Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971); and Barber v. Time, Inc., 348 Mo. 1199, 159 S.W. 2d 291 (1942).

If photographers must depend on the goodwill of police for access, recent cases indicate that this will be a problem.

On March 25, 1977, the New Jersey State Police arrested a fully accredited photographer from the Newark Star Ledger as he was covering an auto accident on a highway and held him incommunicado for more than an hour.

Police claimed he was disorderly. He claimed, however, that he did not interfere with police and authorities violated his constitutional right to photograph the scene of an accident.

The brief in the still unsettled case of State v. Lashinsky argued that:

> Unless reporters have a legal right to photograph and report free from obstructionism such as that in which this trooper was engaged, the result must be either that the public will be denied information concerning vital matters or reporters will be fearful of attending the scene of the crime or accident due to criminal reprisal if they so appear.[15]

In May of 1973, Linda Ross, a contributing editor of the Ann Arbor Sun published a photograph of an undercover narcotics agent outside the Chelsea, Michigan Courthouse. He sued for invasion of privacy and intentional infliction of emotional harm.

He was awarded $40,000. The Michigan Attorney General's Office argued that the First Amendment allows federal and state governments to place some restraints on the publication of "concededly truthful" information and the fact that Burn's "likeness and job description" were exposed to the public during his courtroom appearances "does not. . .create a blanket First Amendment immunity" for Ross.[16]

These cases could be considered straws in the wind but they represent the potential harassment of photographers as they cover the news.

The Tort of Appropriation

The tort of appropriation is constantly mentioned in privacy cases but the Supreme Court has not taken up the issue as it affects the coverage of news.

The case made is that a photograph is used to sell newspapers or magazines--especially those photographs on the front page.

It was mentioned in Cantrell, supra, Johnson City Press Chronicle v. Hammond,[17] and Nelson v. Maine Times Me. Sup. Jud. Ct.2 Med. L. Rept 20110.

In the Johnson City case the plaintiff claimed that

coverage did not require the photographs of Milburn Frank Hammond's nude torso and that the pictures were sensationalized for commercial benefit. The Press Chronicle noted that it had published no extra copies for larger newsstand distribution.

The issue was not taken up in Cantrell and Johnson City and was denied in Nelson v. Maine Times, supra. The court found that the publication of a child's photograph was not commercially beneficial to the Maine Times.

Another case, Booth v. Curtis Publishing Co., 15 App. Div. 2d 343, 223 N.Y.S. dd 737 (1962), was won by the magazine but releases have been obtained for cover pictures since that suit. Thus magazines have changed their practices concerning releases since this suit.

In order for a person to claim appropriation, a judge would have to find that an event was not newsworthy. This would mean he would have to second-guess the editors. The courts, thus far, have refrained in this area.

Appropriation is an area of future difficulty, however, because the gravamen lies in someone making money at the expense of someone's privacy. This is a "righteous tort" and could cause future trouble.

So, an outline of privacy law encroachments on photojournalism emerges that could make photographers wary of photographing anyone but public figures in public places.[18]

SURVEY OF CURRENT THINKING

The law and pending cases do not provide a complete picture of the situation. One needs to know what attorneys are saying to their clients and what photographers are actually doing.

After identification of several "trouble spots" in photojournalism, an open question interview by phone and by person of seven media lawyers and four photographers on actual practices in the field was conducted.

All those contacted were asked:

1) What general rules of thumb do you go by when considering whether to (a) take or (b) use a picture?
2) Has privacy law affected your picture news judgment?
3) What do you do about:
   a) crowd shots? weather shots? park shots? (do you attempt to get identifications?)
   b) shooting in a private home or grounds?
   c) shooting from public on to private property? front porches?
   d) is it "OK" to go with fire or police persons?
   e) courthouse steps? restaurants? private parties?
4) When do you worry about trespass?
5) Any examples of what you haven't run, or ran and worried about?

One of the problems encountered in talking with attorneys was their differing roles in relation to their media

clients. Some were active day-to-day and others saw only problems after the fact.

A second difficulty lay in the lawyers' reluctance to give hard and fast rules to clients because those rules could be used against clients in lawsuits. This extended to discussions with the interviewer. For this reason no attorney is directly identified in this paper.

Photographers were comfortable giving rules of thumb but the issues in their minds were different than those of the attorneys. For that reason, attorney responses are separate from photographers.

Many of the answers were repetitive. Although attorneys were aware of the law, most relied on the method of informing editors of new cases and letting them decide in specific instances. From the interviews, a list of "flags" or worry items was developed. These could become a basis for checkpoints on photographs.

Attorneys

In addition to the case and statute limitations mentioned earlier, areas of worry include captions; mechanical distortion; release forms; minors; nudes; photos taken of, or on private grounds; photos used in a different context; and private persons depicted in a "detracting" situation.

Simple avoidance of the problem can cure the first four problems. The case and statute limitations are known to most media persons. Care should solve the problems of

misplaced or misleading captions and mechanical distortions. Release forms should be read carefully and renewed if a problem is anticipated.

The problems of pictures used out of context is easily solved on the news and feature side. When there is any doubt, new photos should be taken. File photos are dangerous. Attorneys worry when someone goes rummaging through the files to illustrate a story rather than ordering new current pictures. This is where false light cases can occur. The key case here is Leverton v. Curtis Publishing Co., 192 F.2d 974 (3rd Cir. 1951). UPI labels all photos over 24 hours old "File Photo" to help guard against this.

Since the explosion of privacy law, attorneys worry more about areas that are not patently newsworthy. Brights and features seem to cause more problems. The areas of rising worry include minors, nudes, private persons and private property.

The problem with minors is that a guardian cannot really "release" a minor. He may sue up to a year after he reaches a majority. A school principal certainly cannot release a minor. The Cincinnati Enquirer recently settled a case where a boy was identified as in a remedial class.[19] The use of releases can diffuse hostility and "we can just hope the parents can control the child," says one attorney.

They worry about nudes or beaver shots "where someone could be embarrassed by what was shown." In Taylor v KTVB Inc., 96 Idaho 202, 525, p.2d 984 (1974), the news crew

filmed the arrest of Taylor who had appeared on the front porch nude. In January 1975, KTVB settled the suit for $7,500--half the amount of the jury verdict.[20]

They worry when a private person is pictured in any "detracting" situation: necking in a park, background in a police raid, in a homosexual bar, wearing an "unfashionable" look in a "dos and don'ts" fashion column, a patient or resident in an institution, a drunk in a crowd, etc.

These fall in the area of false light or publication of embarrasing private facts. The "reasonable" and newsworthy tests are often applied here. In this situation, it is vital that the photographer inform the editors as to how (and where) the picture was taken.

The second safeguard would be to get identifications for all persons in the pictures. This is hard for the photographer because he often is not sure what is on his film. However, he should crop if he cannot identify.

Attorneys caution photographers to tell editors when a picture is taken by shooting from a public place into a private one. The rule of thumb is to ask whether anyone could have seen the same thing if they were walking by. Although there have been no cases decided against the press where that rule was followed, the captions are, and should be, closely scrutinized, says one attorney.

The newest worry comes when a photographer goes on private property uninvited, especially "public" places of business. Press access is growing more limited here.

In Lloyd Crop., Ltd. v. Tanner, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed. 2d 131 (1972), the court ruled that the public's license to enter a private business establishment is limited to engaged in activities directly related to that business and does not normally extend to the pursuit of unrelated business, e.g., newsgathering or propagandizing customers.[21]

A current case in the New York Courts illustrates the growing problem. In CBS v. LeMistral, NY Sup. Ct., Rpt'd NYLJ 4/8/76:7, CBS has appealed a case where punitive damages were awarded when their cameramen entered LeMistral restaurant with cameras to illustrate a food violation story. The award was on the basis that cameramen had entered without the intention to purchase food and were therefore trespassing. This was a newsworthy event and yet CBS is being assessed not just actual damages, but punitive damages. There was no actual malice or reckless disregard of privacy in this case. The information was, in fact, both true and newsworthy.

The question of what constitutes private property is a growing concern to attorneys. The safeguard could be to obtain permission from proprietors or to film exteriors only.

These cases are an area where concerns of privacy directly infringe on the "right to gather news."

The last area is a large one. "We worry about everything--that's what we get paid for," says one attorney. Newspersons will leave that area to lawyers, however.

Most attorneys do not veto pictures or issue guidelines.

They will, however, discuss issues and even pictures with editors and photographers.

All the attorneys believe that the law of privacy is growing and troublesome and they keep informed on cases. Some are developing guidelines for the staffs of their clients. None are complete or printed, however AP and UPI outline the status of the law in their guidebooks and encourage staff to check with attorneys. In general, decisions are made picture-by-picture, case-by-case.

Photographers

Photographers will take a picture and worry later. They are artists and news-hounds before they are philosophers. However, all interviewed were very aware of their rights as newspersons as they saw them.

Answers were quite uniform, although all tended to think in terms of specific pictures. Their main concern was to get a good photograph--one that had "stopping power" (readers would look at it) and would tell the story in context.

All photographers mentioned that they:

shoot first and ask later;

don't "steal" pictures in private places (they differed on what was a private place);

look out for ridicule of private persons; and

take enough pictures to have a choice later.

In deciding to use a picture they trusted their own

instincts and their editor's wisdom. The two newspaper photographers worried about captions and headlines distorting the context of the picture. They believed they had no control over that process, however.

Had privacy law affected their news judgment? No. They believed anyone in a public place was fair game if the picture didn't distort, was in context and didn't ridicule. Crowd or background shots were permissible as long as there was no ridicule involved.

They agreed that "it's good" to get identifications of grab shots or weather shots because of implied consent, but not having identifications shouldn't stop running a picture if it's a good one. Both AP and UPI wire service photographers write their own captions and have close control over what is said about the picture. They believe they can control the context in which a picture is used. Of course, they ask for identifications after they take the picture.

All said they believed that the newsworthiness privilege protected any pictures they take although they all mentioned "stealing" pictures on private property as not allowed. If they are present as news photographers, however, they consider themselves invited. If they get in the door, they shoot what they see.

Do they believe they can shoot from public to private property? If a normal person on the street could see it then they shoot it. Front porches are generally permissible, but identifications are a good idea in these cases. The theory

is that photographers have implied consent if a person gives his name and address to a photographer without objecting to the use of the photographs.

Can they go wherever police and firemen go? Yes. Photographers are covering public officials and newsworthy events. The biggest problem they mentioned was what Alex Persons called "volunteer fireman" (officious, ignorant persons allegedly in control of a situation who try to order the press around).

Pictures on the courthouse steps depended on the judge's order. If he doesn't proscribe them, then it is permissible to shoot. In restaurants, the photographer generally has to ask permission from the proprietor. Unless he entered to buy lunch and something newsworthy happened. If invited to a private party, one can go and take pictures, they believed.

When do they worry about trespass? They follow the news where it happens. They worry about mistakes but mostly of the false light variety (the picture of a wrong house, etc.). They worry but shoot anyway.

All four photographers were sensitive to possibilities of embarrassment in shooting handicapped persons--children especially.

Although they believed the permission of a school principal was enough in nonembarrassing shots in schools, they all mentioned releases from parents "or someone" with regard to institutions or handicapped on private property,

hospitals, etc. However, they also would generally shoot so as to not show faces or allow positive identifications in group shots at institutions.

All had not used a picture at some time or other out of consideration for the privacy of an individual. However, if it were their only shot for a breaking story, they would reconsider and might run it. They take many pictures of an event to allow themselves a choice. Photographers will continue to "shoot now and worry later" until advised otherwise.

CONCLUSION

The torts of privacy are a growing threat to the media freedom to publish and gather news.

In addition to the already troublesome torts of false light and publication of embarrassing private facts, photographers will have to worry increasingly about the tort of invasion of privacy. Although lawyers are worried about this tort, photographers have not adjusted their procedures in response to the worries. Guidelines for concern about a photograph could be developed to minimize exposure to lawsuits. The use of the specific survey questions developed for this paper could be a basis for these guidelines.

In addition, development of procedures to minimize exposure would be helpful.

These procedures might include:

1) Getting identifications from all principals in grab shots, isolated-from-crowd shots or photos taken when

persons might be unaware they were being photographed. This would allow the subjects to object.

2) Requiring photographers to check captions on their photos before they are published to avoid false light problems.

3) Providing a standard release form for all minors photographed. This might not protect photographers totally but it would help diffuse potential hostility. In addition, routinely concealing the identity of children, patients and inmates by using profile or soft focus procedures would be a good idea.

FOOTNOTES

[1]Paul Clancy, "Privacy, a Chilling Tort," Freedom of Information Report No. 5 (Columbia, Missouri School of Journalism, University of Missouri. March 1, 1976).

[2]Marilyn A. Lashner, "Privacy and the Public's Right to Know," Journalism Quarterly. (Winter 1976): 679-688.

[3]Nick Lacy, "Photography v. Privacy," Freedom of Information Report No. 5 (Columbia, Missouri School of Journalism, University of Missouri. July 1, 1977).

[4]Clancy, p. 1.

[5]Ibid., p. 3.

[6]Ibid., p. 4.

[7]Lacy, p. 6.

[8]Ibid., p. 1.

[9]Ibid.

[10]Harold L. Nelson and Dwight L. Teeter, Jr., Law of Mass Communications, 2nd Ed. (Mineola, NY: Foundation Press, Inc., 1973), p. 185.

[11]Dan Paul, Interview by Telephone, 18 January 1978.

[12]"Press Access Policy Given to Troopers," Editor and Publisher, (January 7, 1978), p. 10.

[13]Kenneth S. Devol, Mass Media and the Supreme Court, 2nd Ed. (New York: Hastings House Publishers, Inc.), pp. 16-17.

[14]Potter Stewart, "Press Functions Upheld," Editor and Publisher, (November 19, 1974), p. 64.

[15]"Photographer Arrested," News Media and the Law, (December 1977), p. 43.

[16]"Privacy, $40,000: Award Appealed," News Media and the Law, (December 1973), p. 30.

[17]"Photos Did Not Invade Privacy Says Court," Editor and Publisher, (November 26, 1977), p. 22.

[18]If this trend continues, the tendency of the press to create "stars" may increase because newspapers may opt for safe, "known faces" more and more.

[19]Interview with Luke Feck, East Lansing, Michigan, 7, February 1977.

[20]"Idaho TV Station Wins Appeal on Film of Man Arrested Nude at Home," Press Censorship Newsletter, No. 7, p. 33.

[21]Zuckman, p. 91.

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